United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1295

United States Court of Appeals

FOR THE SECOND CIRCUIT

Case No. 76-1295

B P/S

UNITED STATES OF AMERICA,

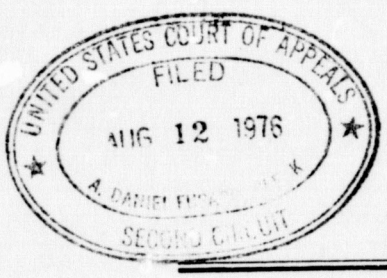
Plaintiff-Appellee,

—v.—

ANGELO MAMONE,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT ANGELO MAMONE



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Statement of the Issues

The issues presented are:

(1) Whether the District Judge abused his discretion in denying the motion of defendant-appellant Angelo Mamone ("Mamone") for a new trial prior to the completion of an evidentiary hearing which he had previously ordered upon the said motion, and

(2) Whether Mamone's Fifth and Sixth Amendment rights were violated insofar as the District Judge's decision to terminate the aforesaid hearing and deny the motion may have been based upon ex parte affidavits or other ex parte communications which the court received from the U.S. Attorney.

Statement of the Case

Preliminary Statement

Mamone appeals from an order of the U.S. District Court for the Southern District of New York (Kevin T. Duffy, J.), entered on May 28, 1976, which terminated a hearing and denied Mamone's motion for a new trial on the ground of newly discovered evidence; viz., that Joseph Marchese, a purported co-defendant, may have acted as a Government informant during the course of the trial and transmitted confidential information to the prosecution in violation of Mamone's Fifth and Sixth Amendment rights.

The Facts

Mamone was one of fifteen persons convicted of conspiracy to violate the federal narcotics laws after an eight week trial in the District Court before Judge Duffy and a jury. Although there was no evidence adduced upon the trial of Mamone's actual dealing in or possession of narcotics, and this Court characterized his role as "somewhat shadowy," it nevertheless affirmed the conviction on March 7, 1975 (see U.S. v. Tramunti, 513 F.2d 1087,1109).*

On October 31, 1974, while the appeal to this Court was pending, Mamone moved for a new trial pursuant to Rule 33 of the

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* At the same time, this Court denied Mamone's request for remand of his various Rule 33 motions (513 F.2d 1121).

Federal Rules of Criminal Procedure on the ground that Joseph Marchese, a defendant against whom the indictment had been dismissed at the conclusion of the Government's case, was a Government informant and, as such, may have transmitted privileged defense information to the Government.*

Evidence of Marchese's informant activities submitted in support of the motion was obtained from the court files of a narcotics prosecution in the U.S. District Court for the Middle District of California (U.S. v. Willie Lee Knight, Index No. 10068-R-C.D.).** Amongst the Jencks Act material furnished to the defense in Knight was a statement dated October 1, 1971, in Marchese's handwriting, in which he described his undercover activities leading to Knight's arrest (see A. 11-17).

The Knight "3500" material shows that at least since 1971 Marchese had been working for the Drug Enforcement Administration

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* Mamone also moved for a new trial on the ground that the Government may have intruded upon his attorney-client relationship through electronic surveillance of the home and office telephones of the lead defense counsel conducted by New York State Special Prosecutor Maurice Nadjari. The gravamen of that motion was that confidential communications intercepted by Mr. Nadjari may have been turned over to the U.S. Attorney . By order dated May 28, 1976, Judge Duffy directed the U.S. Attorney to produce for in camera review all of its documents and other material relating to the aforesaid wiretaps, and continued that motion until the material produced by the Government was reviewed. As of this writing, there has been no decision on the "wire-tap" motion.

** It was stipulated in Knight that Marchese was listed in the New York office of the Drug Enforcement Administration under informant number SCI-1-0027 (A. 19 , Stip. 3/21/74 ¶3).

under the supervision of, among others, agents Peter Pallatroni, Michael Spataro and George Reilly, the same agents who on February 3, 1972 arrested defendant Joseph DiNapoli and co-conspirator Vincent Papa with almost a million dollars in cash and thereby triggered the chain of events leading to the Tramunti prosecution. See 513 F.2d 1100-1104, where this Court described in detail the events surrounding the arrest of DiNapoli and Papa by group leader Pallatroni and his agents, who were themselves important prosecution witnesses in Tramunti. Moreover, Mamone did not rely only on the happenstance that it was the same team of agents who controlled Marchese and his alleged co-conspirators, DiNapoli and Papa, for it was claimed, and not denied, that Marchese was credited by the DEA with providing the information which led to the February 3, 1972 arrest of DiNapoli and Papa, among other arrests (A. 7,76).

The Government contended below that merely because Marchese may have been an informant in 1971 and 1972 did not establish that he was an informant during the period of the Tramunti trial from January to March, 1974. This argument ignores the additional circumstantial evidence of Marchese's continued cooperation, including the testimony of Detective Michael Spataro, a detective assigned to the Joint New York Federal-State Task Force, which made clear that the Government's hold on Marchese was very much alive during the time of the Tramunti trial. On January 28, 1974, during the height of the Tramunti trial, Detective Spataro testified upon Knight's retrial that Marchese's initial cooperation

was induced by a commitment that the cooperation would be made known to the sentencing court in various cases which were then pending against Marchese. Detective Spataro further testified on January 28, 1974 that Marchese had not been brought to trial on those indictments and that they were still pending (A. 22-4). Thus, the leverage by which the Government initially procured Marchese's cooperation continued to exist throughout the Tramunti trial.

The continued efficacy of the pending indictments as a threat against Marchese was confirmed by the fact that on or about March 19, 1974, scant days after the Tramunti verdict, Marchese appeared in California to testify on behalf of the Government upon a retrial of Willie Lee Knight following a reversal of Knight's 1972 conviction by the Ninth Circuit (A. 8).*

Interestingly, although Marchese had been under subpoena to testify in Knight at least since December, 1973, it was Assistant U.S. Attorney Walter Phillips who determined that Marchese would not be permitted to honor the process of the Federal District Court. The record does not disclose any application to the court concerning the Marchese subpoena. Needless to say, Mr. Phillips did not exercise similar dominion over any other defendant, several of whom were permitted by Judge Duffy to briefly absent themselves from the trial for various reasons.

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* On that occasion, Marchese acknowledged to Victor Sherman, Esq., Knight's attorney, that he had been a Government informant during the preceding three years (A. 8).

It was not seriously disputed that Marchese was a Government informant working for the principal Drug Enforcement Administration agents in the case at bar immediately before and immediately after the Tramunti trial; that he was credited by the Drug Enforcement Administration with providing information leading to the arrest of DiNapoli and Papa by the principal agent-witnesses in the Tramunti case, and that the means of obtaining his cooperation continued to exist throughout the Tramunti trial. Those factors coupled with the conceded periodic contacts during the Tramunti trial between Marchese and agent Torre Shutes of the DEA (A. 31) and the showing that Marchese and his attorney were privy to confidential discussions (A. 9), it is submitted, were more than sufficient to require a hearing on Mamone's motion.

Initially Judge Duffy agreed, for he ordered a hearing to commence on July 7, 1975. On that day, argument was heard with respect to various subpoenas served on behalf of Mamone as well as the procedure to be followed upon the hearing. No evidence was taken. However, the Government was directed to produce Marchese's informant file for in camera inspection and possible use upon the hearing (A. 41-2).

The following day, July 8th, it was agreed that Walter Phillips, a former senior member of the prosecution team and then a Special Attorney General of the State of Pennsylvania, would be "heard out of turn" (A. 49). However, the Government did not produce

Marchese's informant file as previously directed by Judge Duffy. Accordingly, it was decided to proceed with Phillip's testimony subject to his recall when the informant file was produced. The question of whether the same procedure would be followed with respect to other witnesses was left open (A. 50-2).

On direct examination, Phillips testified that although he had invited Marchese to cooperate with the Government, Marchese refused to do so (A. 56). Phillips subsequently testified that in a later interview of Marchese, he again invited Marchese to cooperate, and "I believe he said that he did not wish to cooperate, but I am not absolutely certain about that" (A.58 [emphasis ours]).* In substance, however, it was Phillip's direct testimony that he did not directly or indirectly receive any information from Marchese during the course of the trial (A. 59-60).

On cross-examination, it was ascertained that Phillips and another Assistant U.S. Attorney working on the case had prepared a pre-arraignment interview sheet of Marchese on October 3, 1973. That document was received in evidence as Government's Exhibit I. However, the Government objected to allowing Mamone's attorneys to inspect that document or to use it on cross-examination (A. 70), whereupon, after in camera inspection of Government's Exhibit I, the following colloquy ensued (A. 71):

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* Thus, Judge Duffy's reference to a two day hearing (A. 80) should not be read to refer to two days of evidentiary proceedings. The actual testimony consumed less than two hours.

THE COURT: Mr. Engel, you persist in your objection?

MR. ENGEL: Yes, your Honor.

THE COURT: Mr. Phillips, you are under direct orders of this court to present yourself whenever this hearing is continued. Unfortunately, it will cause you to act like a yo-yo between here and Philadelphia to identify every document to which is appended your signature. This is your signature on Government's Exhibit 1; is that correct?

The hearing was immediately adjourned pending the Government's production of Marchese's informant file without any cross-examination as to the substance of Phillips' direct testimony.

There the matter rested until September 8, 1975, when attorneys for Mamone were served with a memorandum of law ostensibly in support of a Government motion to deny the motion for a new trial without further hearings. That memorandum was apparently a smoke-screen, for we were not served with nor did we have any knowledge of the existence of such a motion, or of a sealed affidavit which was submitted by former U.S. Attorney Paul J. Curran on or about August 21, 1975, or of a sealed memorandum of law submitted by the U.S. Attorney's Office on or about that same day. In the course of docketing the record in connection with the instant appeal, the existence of those "sealed" documents was disclosed to Mamone's attorneys by Thomas E. Engel, an Assistant U.S. Attorney. Unfortunately, the District Court Clerk has not been able to locate the "sealed" Curran affidavit or memorandum, and accordingly certified the record without those documents.

Point I

THE DISTRICT JUDGE ERRED IN DENYING MAMONE'S MOTION FOR A NEW TRIAL WITHOUT A HEARING.

In considering whether Mamone made "the minimum showing which would warrant an evidentiary hearing," Judge Duffy, apparently purporting to summarize Mamone's evidentiary contentions, cited:

1) Marchese's participation as a Government informant in the Knight case;

2) the allegation that "Marchese has provided information as to drug dealers not named in either the Knight or Tramunti indictments";

3) the fact that the Tramunti investigation was referred to by the code name "Shamrock," the same name as that of a private cab company in which Marchese had an interest.

It is respectfully submitted that Judge Duffy's analysis of Mamone's contentions materially misapprehended the significance of the evidence and omitted significant other items of probative documentary evidence produced in support of the motion.

For example, to merely refer to Marchese's cooperation in the Knight case, as the District Judge did, without considering that such cooperation occurred shortly before and immediately after the Tramunti trial, and to overlook that Marchese's"cooperation" consisted of undercover operations under the aegis of the same Drug Enforcement Administration agents who investigated the Tramunti case and gave highly material testimony in Tramunti,

is to deny Marchese's role in Knight its appropriate circumstantial weight. Similarly, in suggesting that Mamone merely alleged that Marchese provided information as to drug dealers not named in the Knight or Tramunti indictments, Judge Duffy overlooked that from the outset Mamone claimed - and it has not been denied - that Marchese provided information leading to the arrest of defendant Joseph DiNapoli and co-conspirator Vincent Papa, and the seizure of almost $1,000,000 in cash on February 3, 1973. As noted, that arrest triggered the entire Tramunti investigation and prosecution.

There are other significant omissions in Judge Duffy's opinion. No mention is made of the fact that the pending indictments through which the "Tramunti-agents" initially elicited Marchese's cooperation were open throughout the Tramunti trial. Thus, the leverage afforded by those indictments remained in the hands of group leader Pallatroni and his agents while they were investigating the Tramunti case, throughout their testimony and the remainder of the trial, and at all times Marchese and his lawyers sat at counsel table and participated in the joint defense. Moreover, the District Court opinion does not indicate that any consideration was given to the undenied contacts during the course of the trial between Marchese and agent Torre Shutes.

We have no way of knowing whether the DEA agents were successful in continuing Marchese's cooperation during the trial or what actually transpired between Marchese and Shutes. Certainly,

the means of utilizing Marchese as a spy and the opportunity for him to act as such was apparent. Phillips in his brief direct testimony admitted his efforts to enlist Marchese's cooperation and at least once conceded that Marchese may not have refused (A. 58). Moreover, Marchese's March,1974 appearance in California on behalf of the Government shows his continued disposition to cooperate with the Government. Whether he actually did so during the Tramunti trial, and if so, the extent to which he did so, can only be determined upon an evidentiary hearing, for the determination of those issues depends on information in the exclusive possession of the Government.

In Dalli v. U.S., 491 F.2d 758 (1973), which involved a petition under 28 U.S.C. §2255, this Court condemned the summary denial of post-conviction relief and observed, at p.760, that:

> "Section 2255 requires a hearing to resolve disputed issues of fact'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' See Fontaine v. United States, 411 U.S. 213,215, 93 S.Ct. 1461, 1462, 36 L.Ed.2d 169 (1973). In making that threshhold determination the court looks primarily to the affidavit or other evidence proffered in support of the application in order to determine whether, if the evidence should be offered at a hearing, it would be admissible proof entitling the petitioner to relief. Mere generalities or hearsay statements will not normally entitle the applicant to a hearing."

Here, Mamone does not rely on "hearsay or mere generalities." He has produced evidence in Marchese's own hand establishing his informant activities. The Knight case testimony of narcotics

agents which confirmed that the pending indictments, the means by which Marchese's cooperation was obtained, are still extant. He has listed without contradiction or denial various cases in which Marchese has provided information leading to narcotics arrests, including that of Joseph DiNapoli and Vincent Papa, and has has further pointed out without contradiction or denial that there were continuing contacts between a narcotics agent assigned to the Tramunti case and Marchese during the course of the trial. Such evidence, it is respectfully submitted, entitled Mamone to an evidentiary hearing to determine whether there were covert disclosures of privileged information from Marchese to those agents, and ultimately to the prosecutors. See Dalli v. U.S., supra, and also, Taylor v. U.S., 487 F.2d 307 (2nd Cir. 1973); U.S. v. Huffman, 490 F.2d 412 (8th Cir. 1973).

Nor should the Government denials of complicity serve to deprive Mamone of a hearing, for the disclosure of surreptitious use of a sham defendant has often proved to be a belated thing. See U.S. v. Arroyo, 494 F.2d 1316 (2nd Cir. 1974); U.S. v. Lusterino, 450 F.2d 572 (2nd Cir. 1971); U.S. v. Rosner, 485 F.2d 1213 (2nd Cir. 1973); U.S. v. Rispo, 460 F.2d 965 (3rd Cir. 1972); and, in particular, U.S. v. Mele, 462 F.2d 918 (1972), where this Court reversed a narcotics conviction and ordered a new trial because of the particularly outrageous nature of the Government intrusions, despite the Government's claim that its

alleged informant was a true defendant and had not provided it with privileged information.*

In each of the above-cited cases, the defendant was afforded a hearing. It is respectfully submitted that Mamone's initial showing is at least as strong as that made in Arroyo, Lusterino, Rosner and Mele. He too is therefore entitled to a hearing. Indeed, as noted, Judge Duffy initially agreed and directed that a hearing be held. Upon that hearing, he indicated in open court his intention to continue the same. It was only after he received ex parte sealed affidavits and memoranda from the U.S. Attorney's Office that he terminated the hearing and denied Mamone's motion.

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* We need not argue whether Judge Duffy is legally correct in holding that the use of a sham defendant per se requires reversal only under certain limited circumstances. That question is pending before the Supreme Court. Here, an evidentiary hearing is required to determine the nature and extent of Marchese's activities during the trial.

Point II

THE SUBMISSION BY THE U.S. ATTORNEY OF A SEALED EX PARTE AFFIDAVIT AND LEGAL MEMORANDUM TO THE DISTRICT COURT VIOLATED MAMONE'S FIFTH AND SIXTH AMENDMENT RIGHTS.

On or about July 1, 1976, in the course of docketing the record for the instant appeal, Assistant U.S. Attorney Thomas E. Engel requested that we stipulate that a sealed affidavit of former U.S. Attorney Paul J. Curran, sworn to August 21, 1975, and a sealed memorandum of law bearing the same date, be included among the documents to be transmitted to this Court (Stipulation, A. 83). Mr. Engel's request provided the first and only notice Mamone or his attorney received of the existence of those documents or their submission to Judge Duffy. Unfortunately, no trace of the sealed affidavit or memorandum could be found in the records or files of the District Court. The record was therefore certified without the sealed submissions.

We contend that it was error for the District Court to have accepted an ex parte affidavit and memorandum of law from the U.S. Attorney without notice to Mamone or an opportunity for him to be heard with respect thereto. Determination of Mamone's motion on the basis of ex parte factual and legal contentions in the sealed documents not only deprived Mamone of an opportunity to reply; it also deprived him of the effective assistance of counsel with respect to perhaps the most significant aspects of the proceedings below. Cf. Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger

v. Hamlin, 407 U.S. 5 (1972).

In Alderman v. U.S., 394 U.S. 165,183 (1967), the court discussed the inherent disadvantage to a defendant created by in camera evaluation of government records and stated that:

> ". . . if the hearings are to be more than a formality and petitioners not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the Government was not entitled to use in building its case against them."

See, also, Dennis v. U.S., 384 U.S. 855,868-75 (1966); U.S. v. Persico, 349 F.2d 6 (2nd Cir. 1965) ("In the absence of some extenuating circumstance all proceedings affecting the trial should be conducted in the presence of counsel for both sides."); and Briscoe v. Kusper, 435 F.2d 1046,1056 (7th Cir. 1971), where it was noted that:

> "Reliance upon evidence considered in camera as the basis for decision is fundamentally inimical to due process."

We do not argue that ex parte submissions to the court are per se inappropriate under all circumstances. Giordano v. U.S., 394 U.S. 310 (1969). However, the kind of material traditionally submitted for in camera evaluation, such as grand jury minutes or investigative documents (Alderman, supra, n.14, pp.182-3) or government files sought to be discovered (U.S. ex rel. Williams v. Dutton, 431 F.2d 70 [5th Cir. 1970]), is far different from the litigation documents, i.e., the affidavit and memorandum of law, prepared specifically in response to this motion. The sealed

ex parte documents were not confidential records kept in the regular course of the Government's business but were prepared for the purpose of persuading the court below to deny Mamone's motion without further hearings. Basic fairness required that they be served upon Mamone and that he be allowed to respond upon reasonable notice.

CONCLUSION

The order appealed from should be reversed and the matter remanded to the District Court for an evidentiary hearing.

August 13, 1976.

Respectfully submitted,

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